

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NEENA DUBAY and U.S. POSTAL SERVICE,
POST OFFICE, Shelby Township, MS

*Docket No. 03-341; Submitted on the Record;
Issued May 27, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to justify termination of appellant's benefits effective August 22, 2001.

On September 18, 1995 appellant, then a 31-year-old letter carrier, filed a claim alleging that she developed a shoulder condition while lifting mail trays. Appellant stopped work on July 5, 1995 and did not return. The Office accepted the claim for right shoulder impingement syndrome and expanded this to include thoracic nerve palsy. Thereafter, the Office authorized surgery for the decompression of the cervical rib.

Appellant submitted treatment notes from Dr. David K. Davis, an internist, and Dr. John L. Glover, a Board-certified surgeon. Dr. Davis noted a history of appellant's work-related injury. He diagnosed appellant with right long thoracic nerve palsy; scapular winging; chronic muscle fatigue; and weakness. The physician noted that appellant was unable to perform the employment tasks of sorting mail. Dr. Glover's operative report of February 5, 1998 indicated that he performed a right brachial plexus neurolysis and first rib resection. Dr. Glover diagnosed appellant with right thoracic outlet syndrome.

Thereafter, appellant submitted reports from Dr. Randi J. Long, Board-certified in physical medicine and rehabilitation. Dr. Long examined appellant upon the request of her treating physician, Dr. Glover. Dr. Long noted a history of appellant's work-related injury and continued symptomology. He noted that appellant continued to have pain in the neck and right arm. The physician noted that appellant remained off work due to the nature of her condition.

Appellant was referred to a second opinion physician, Dr. Norman L. Pollak, a Board-certified orthopedist. In medical reports dated July 13 and August 18, 1999, Dr. Pollak indicated that he reviewed the records provided to him and performed a physical examination of the appellant. He noted a history of appellant's work-related injury. The physician indicated that appellant continued to experience residuals of her work-related injury and was not capable of returning to her date-of-injury job. However, Dr. Pollak noted that appellant was capable of

performing limited-duty work. He noted that appellant did not suffer from reflex sympathetic dystrophy or a right shoulder impingement syndrome but did exhibit findings of winging scapula. The physician further noted that he could not causally relate the disc protrusion and lesion of the cervical spine as revealed on the magnetic resonance imaging scan to appellant's work-related injury.

Thereafter, appellant submitted various records from Dr. Long dated April 6 and October 19, 1999. He indicated that he reviewed Dr. Pollak's report. He noted that he disagreed with Dr. Pollak's assessment that appellant could return to a light-duty job with her history of neck pain and fatigue. The physician noted that, although Dr. Pollak returned appellant to light duty with restrictions, Dr. Long had significant reservations of appellant's ability to succeed in even a light-duty job.¹

The Office determined that a conflict of medical opinion had been established between Dr. Long, appellant's treating physician, who indicated that appellant was disabled, experiencing residuals of her work-related injury and could not work and Dr. Pollak, an Office referral physician, who determined that there were no objective findings to support that appellant continued to suffer residuals from the work-related injury of June 23, 1995 and could return to light-duty work with restrictions.

To resolve the conflict, appellant was referred to a referee physician, Dr. Milton Green, a Board-certified orthopedic surgeon. Dr. Green indicated in a report dated April 9, 2001 that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of appellant's work-related injury. Upon physical examination the physician noted full cervical flexion, rotation and lateral bending; extension was limited to 20 degrees; there was slight atrophy of the infraspinatus on the right; there was no evidence of long thoracic nerve palsy; and there was marked limitation of elevation of the right shoulder; and full external rotation at the side. Dr. Green indicated that appellant previously suffered a winged scapula; however, he noted that appellant's employment duties of reaching and picking up items that weighed five to eight pounds would not cause a long thoracic nerve stretch injury. He noted that this injury had resolved. The physician indicated that appellant did not appear to suffer residuals of the accepted work-related injury. Dr. Green noted that appellant was capable of working as a letter carrier and he had no further recommendation for her treatment.²

On June 21, 2001 the Office issued a notice of proposed termination of all compensation benefits on the grounds that Dr. Green's report dated April 9, 2001 established no medical residuals as a result of the June 23, 1995 employment injury.

¹ In a United States Postal Inspection report dated September 13, 2000, it was revealed that appellant was under investigation from April to July 2000 for exceeding her medical restrictions. The report noted that appellant had been determined to be disabled from February 5, 1998; however, she was observed and videotaped at an amusement park moving freely without any apparent pain or discomfort. Additionally, it was noted that there were inconsistencies between her stated inabilities and her physical activities.

² The Office indicated that Dr. Green was provided with a copy of the video surveillance of appellant by the U.S. Postal Inspector from the period of April to July 2000.

Appellant continued to submit reports from Dr. Long dated September 3, 1998 to July 19, 2001. The reports from September 3, 1998 to March 29, 2001 indicated that appellant continued to suffer residuals of her work-related injury and remained disabled. His report of July 19, 2001 noted that appellant continued to have right pain into the trapezius and scapula. The physician noted that appellant had significant improvement in her hand symptomology. Dr. Long encouraged appellant to return to work with restrictions starting at four hours and increasing to eight hours over the next two months.

By decision dated August 22, 2001, the Office terminated appellant's benefits on the grounds that the weight of the medical evidence established that appellant had no residuals resulting from her June 23, 1995 employment injury.

In a letter dated August 31, 2001, appellant requested an oral hearing before an Office hearing representative. The hearing was held on February 27, 2002. Appellant submitted a report from Dr. Long dated August 9, 2001. He noted treating appellant for the side effects from a medication she was prescribed. He noted that appellant discussed returning to work and photographs taken by an investigator.³

In a decision dated September 12, 2002, the hearing representative affirmed the decision of the Office dated April 17, 2000.

The Board finds that the Office has met its burden of proof to terminate benefits effective August 22, 2001.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵

In this case, the Office accepted appellant's claim for right shoulder impingement syndrome; thoracic nerve palsy; and surgery for the decompression of the cervical rib. The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's attending physician, Dr. Long, and Dr. Pollak, the Office referral physician. Consequently, the Office referred appellant to Dr. Green to resolve the conflict.

³ In an indictment dated June 26, 2002, appellant was charged with three counts of mail fraud and two counts of false statements to obtain Federal Employees' Compensation Act benefits. On March 12, 2002 appellant entered into a plea agreement, in which she plead guilty of one count of making a false statement to obtain the Act.

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

The Board finds that, under the circumstances of this case, the opinion of Dr. Green is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's work-related condition has ceased.

Dr. Green reviewed appellant's history, reported findings and indicated that appellant previously suffered a winged scapula; however, he noted that her employment duties of reaching and picking up items, which weighed five to eight pounds would not cause a long thoracic nerve stretch injury. Dr. Green further noted that this injury had resolved. The physician indicated that appellant did not appear to suffer residuals of the accepted work-related injury. Dr. Green indicated that appellant's main problem was limitation of motion; however, there were no objective findings of this condition at the time of examination. He noted that, based on his clinical examination, the review of the record and the diagnostic studies, there was no real objective findings of disability. The physician noted that appellant was capable of working as a letter carrier and he had no further recommendation for her treatment.

Appellant submitted several reports from Dr. Long dated September 3, 1998 to July 19, 2001, which continued to support total disability. However, these reports were repetitive of other reports in the record and did not contain new findings or rationale, upon which a new conflict might be based. Therefore, these reports are insufficient to overcome that of Dr. Green or to create a new medical conflict.⁷

The Board finds that there is no medical evidence which supports that appellant's disability was causally related to her accepted work-related condition. Dr. Green had full knowledge of the relevant facts and evaluated the course of appellant's condition. He is a specialist in the appropriate field. At the time benefits were terminated, he clearly opined that appellant had absolutely no work-related reason for disability. His opinion is found to be probative evidence and reliable. The Board finds that Dr. Green's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits.

The medical evidence submitted by appellant after termination of benefits either did not specifically address how any condition was due to the June 23, 1995 work injury or other incidents or duplicated evidence previously considered by the Office. Appellant submitted a report from Dr. Long dated August 9, 2001. He noted treating appellant for the side effects from a medication she was prescribed. He noted that appellant discussed returning to work and photographs taken by the investigator. Dr. Long's report is similar to his previous reports and provides no new medical reasoning or rationale in support of his position. The Board has held that evidence that repeats or duplicates evidence already in the case record has no evidentiary

⁶ *Aubrey Belnavis*, 37 ECAB 206 (1985).

⁷ *See Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

value.⁸ Therefore, the report from Dr. Long is insufficient to overcome that of Dr. Green or to create a new medical conflict.⁹

Other medical records submitted by appellant did not specifically address how any continuing condition was causally related to the June 23, 1995 employment injury.

For these reasons, the Office met its burden of proof in terminating appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated September 12, 2002 is hereby affirmed.

Dated, Washington, DC
May 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁸ See *Daniel Deparini*, 44 ECAB 657 (1993).

⁹ See *Howard Y. Miyashiro* and *Dorothy Sidwell*, *supra* note 7. The Board notes that Dr. Long's reports do not contain new findings or rationale, upon which a new conflict might be based.